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2 Q. Yes.

3 A. Not that I recall.

4 Q. Who conveyed the information about
5 Merrill's projected losses to the Wachtell
6 attorneys at the time?

7 A. I don't remember. There's some of
8 the notes I've seen suggested that perhaps I gave
9 them some of the information orally but I don't
10 remember it.

11 Q. Was Mr. Price present at any of the
12 conversations you've had with Wachtell attorneys?

13 A. Not in this time period. There was a
14 discussion he was a part of on November the 20th.

15 Q. Was anybody else from Bank of America
16 who was not a lawyer or a businessperson who was
17 present in your conversations with Wachtell
18 attorneys on November 12th and 13th.

19 A. I recall at some point in here there
20 was a discussion that Greg Curl and I had with Ed
21 Herlihy and I don't recall all the specifics of
22 that. But there was at least that conversation
23 where there was a businessperson participating in
24 the discussion with Mr. Herlihy.

25 Q. Do you recall what Mr. Curl said in

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2 that conversation?

3 A. No, as I said, I don't -- I recall
4 sitting in his office and talking to Herlihy but
5 I don't remember specifically what we talked
6 about.

7 Q. What did you do between -- after
8 November 13th and the conversations you've had
9 with Wachtell?

10 A. What did I do after that?

11 Q. Next, right.

12 A. Next, well, I asked Teresa Brenner
13 and some other people to gather up some
14 information for me. I wanted to see what Merrill
15 Lynch's earnings had looked like for the last
16 four or five quarters, I wanted to see the proxy
17 statement, I wanted to see the disclosure
18 documents that were incorporated by reference
19 into the proxy statement. I wanted to look at
20 those to see what kinds of disclosures had
21 previously been made to shareholders.

22 And I recall asking Ms. Brenner I
23 think to look specifically at the materials
24 announcing the merger and to see whether we or
25 Merrill Lynch had made any projections in the

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2 announcement about Merrill's possible future
3 performance.

4 Q. Did you ask Ms. Brenner or anybody
5 else to collect any additional materials for you?

6 A. Those are the ones I remember.

7 Q. Why did you ask Ms. Brenner to
8 collect prior earnings of Merrill Lynch for you?

9 A. Because I wanted to understand how
10 this 5 billion dollar number related to what
11 Merrill Lynch's historical experience had been.
12 I knew just as a matter of knowledge about the
13 industry that Merrill had had significant losses
14 but I didn't remember what those losses were. So
15 I wanted to know going back to the time, the
16 financial crisis had started in August 2007, what
17 Merrill's performance had been because I wanted
18 to see how this 5 billion dollar number had
19 related to its experience before this financial
20 crisis had started.

21 Q. Did Ms. Brenner collect that
22 financial information for you?

23 A. I don't remember whether she did or
24 somebody else did but I remember receiving that
25 information.

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2 (Plaintiff's Exhibit 162, Document
3 bearing Bates numbers BAC-ML-NYAG 502896
4 through 97, was so marked for
5 identification.)

6 Q. Let me show you what I've marked as
7 Plaintiff's Exhibit 162. It's a two-page
8 document, the Bates number on it is BAC-ML-NYAG
9 502896 through 97. The front page is an e-mail
10 from David Belk to Greg Curl, Joe Price and Tim
11 Mayopoulos dated November 19, 2008.

12 Mr. Mayopoulos, do you recall
13 receiving this e-mail?

14 A. I don't specifically recall this
15 e-mail but this was the information that I had
16 asked for and I recall that I did receive it.

17 Q. Did you review this information when
18 you got it?

19 A. Yes.

20 Q. And did you do that in connection
21 with your assessment as to whether or not
22 Merrill's projected financial performance had to
23 be disclosed?

24 A. Yes.

25 Q. And what was your reaction to the

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2 information that is attached to Mr. Belk's
3 e-mail?

4 A. My reaction was that Merrill Lynch
5 had suffered multibillion dollar losses for every
6 quarter for the last five quarters going back to
7 the third quarter of 2007. That those losses had
8 ranged from anywhere from about \$2 billion to
9 \$10 billion. My reaction when I saw this was
10 while \$5 billion is a big number in the context
11 of the trend of Merrill Lynch's past performance,
12 it was par for the course.

13 Q. You mentioned that you also asked Ms.
14 Brenner to collect for you disclosure documents
15 that were incorporated by reference in the proxy
16 filing. Do you recall which documents those were
17 in particular?

18 A. I don't know that I recall exactly.
19 My recollection is that it included the quarterly
20 filings and went back to the last 10-K that each
21 company had filed as well as the Qs for the
22 first, second and third quarters.

23 Q. Those were the filings for both
24 Merrill Lynch and Bank of America?

25 A. Yes.

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2 Q. And you reviewed both?

3 A. I believe so.

4 Q. And what was your reaction to the
5 information contained in those filings?

6 A. I thought that the disclosures made
7 by both companies made it very clear that
8 financial institutions, including Merrill Lynch,
9 were facing extremely difficult circumstances,
10 that these were really unprecedented times, that
11 Merrill and other institutions had suffered very
12 significant losses, and that there was absolutely
13 no suggestion that things were getting better.
14 If anything, things were getting worse.

15 And so my reaction was that investors
16 reading these disclosures would conclude that
17 there was no reason to think that Merrill's
18 financial performance in the fourth quarter of
19 2008 would be any better and might actually be
20 worse than it had been over the prior four or
21 five quarters.

22 Q. Do you recall if any of the filings
23 you had reviewed contained forward looking
24 statements about Merrill Lynch's financial
25 performance?

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A. My recollection is that I asked Ms. Brenner to look at whether Bank of America or Merrill had made any statements about or projections about Merrill's possible future financial performance such that there might be some duty to correct those, and I believe her conclusion was there were no such statements, and as I reviewed the materials I did not conclude that there were any such statements.

Q. Did you -- strike that. In any of the filings that you had reviewed do you recall seeing information about -- projections about the capital ratios of the combined companies?

A. I recall that one of the things we ended up looking at as part of this discussion was issues about tier 1 capital, and I think there were some statements about what tier 1 capital ratio of the combined company was likely to be following the merger. And I recall that we asked, I asked and I think Mr. Price asked the finance department to take a look at and do some analysis around that issue, and I don't -- my recollection about this isn't as clear as the earnings issues but I think we ended up

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2 concluding that on the capital ratio issue that
3 we didn't think that there was additional
4 information that should be disclosed. Based on
5 that analysis that was done by the finance
6 department.

7 Q. Who in the finance department did
8 that analysis, do you know?

9 A. My recollection is Craig Rosato and
10 Randy Shearer were involved with that.

11 Q. Was the purpose of their analysis to
12 see whether Merrill's projected losses would have
13 an impact on the tier 1 capital for the combined
14 companies?

15 A. I don't remember if it was just the
16 projected losses or whether there were other
17 factors involved, but I remember they looked at
18 the question of tier 1 capital.

19 Q. Did Mr. Rosato and other people in
20 the finance department conclude that the
21 projected losses would have no impact on the
22 capital ratio for the combined company?

23 A. I don't remember exactly what they
24 concluded. I remember that I think we concluded
25 that the result was such that we didn't think we

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2 needed to make an additional disclosure.

3 Q. Do you recall what specifically they
4 had -- after conducting their analysis they had
5 conveyed either to you or to Mr. Price?

6 A. I don't remember the numbers. I
7 remember we talked about the numbers and I recall
8 that I think they may have actually reviewed
9 their analysis with us, but I don't remember
10 specifically what was said about it.

11 Q. Who concluded that -- after they
12 conducted their analysis, who concluded that no
13 disclosure was required, was it them or was it
14 somebody else?

15 A. I think it was all of us
16 collectively.

17 Q. When you say all of us, you mean
18 yourself, Mr. Price and Craig Rosato and anybody
19 else?

20 A. Yes. And my recollection is that we
21 also discussed this issue with Wachtell Lipton.

22 Q. Specifically the issue of whether or
23 not there was some duty to correct prior
24 statements concerning the combined company's
25 tier 1 capital ratio?

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2 A. That's my recollection.

3 Q. Who from Wachtell, do you recall?

4 A. It was Mr. Herlihy and Mr. Demmo who
5 were involved in these discussions.

6 Q. As part of those discussions about
7 that particular topic, did anyone express a view
8 that the company should come out and disclose
9 Merrill's projected losses for the fourth quarter
10 because of a possible impact on the tier 1
11 capital ratio?

12 A. No.

13 Q. What was the reason that it was
14 concluded that no disclosure had to be made in
15 connection with the capital ratio for the
16 combined companies?

17 A. As I said, I don't remember the
18 specifics of the results of the analysis but my
19 recollection is that the analysis showed that it
20 wasn't an impact that was sufficient to change
21 the result.

22 Q. You also mentioned that you had
23 reviewed the materials announcing the merger as
24 part of your analysis in determining whether or
25 not Merrill's projected losses had to be

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2 disclosed.

3 A. Yes.

4 Q. What was -- did you review those
5 materials?

6 A. I think so.

7 Q. And what was the reaction to those?

8 A. They were brief and my recollection
9 is that the lawyers who had reviewed the
10 materials had been careful that there would not
11 be any statements about possible future
12 performance of the combined company or Merrill
13 Lynch, and that my review of the materials showed
14 that there wasn't anything in those materials
15 such that we had a duty to correct it or update
16 it.

17 Q. Let me show you what I previously
18 marked as -- what has been previously marked as
19 Plaintiff's Exhibit 123. The top e-mail, Mr.
20 Mayopoulos, is from David Belk to you, do you see
21 that?

22 A. Yes.

23 Q. Who is David Belk?

24 A. David Belk is a person who worked for
25 Mr. Curl in the corporate strategy group.

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2 Q. He's forwarding to you an e-mail from
3 Harrison Thurston, do you know who that is?

4 A. Yes. He was the junior member of Mr.
5 Curl's team, he worked for -- he worked with Mr.
6 Belk.

7 Q. Mr. Thurston wrote "Attached is the
8 spreadsheet showing analysis EPS estimates for
9 Merrill, Goldman Sachs and Morgan Stanley."

10 A. Yes.

11 Q. And Mr. Belk forwarded that
12 information to you. Did you ask for that
13 information?

14 A. Yes, I think I did.

15 Q. And did you ask for it as part of
16 your analysis as to whether or not a disclosure
17 had to be made on Merrill Lynch's financial
18 performance for the fourth quarter?

19 A. I was interested in seeing --

20 Q. Let me ask that question again. Did
21 you ask for this information, Mr. Mayopoulos, as
22 part of your analysis into whether or not a
23 disclosure had to be made of Merrill Lynch's
24 projected financial performance for the quarter?

25 A. Yes, I wanted to see what the

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2 analysts were estimating for these companies.

3 Q. Why did you want to get that
4 information?

5 A. I thought it might help inform me as
6 to whether investors would think that disclosure
7 about a 5 billion dollar loss for the quarter
8 would change the mix of information available to
9 them.

10 Q. Do you recall if you reviewed that
11 information after you got it?

12 A. I think I look at it but I don't
13 think I could draw any conclusions from it.

14 Q. Why not?

15 A. It seems the analysts were all over
16 the lot and didn't really lead me to any
17 particular conclusions.

18 Q. If you'll turn to the page with the
19 Bates ending 884. It appears to describe analyst
20 estimates for Merrill Lynch with the measure
21 being net income, do you see that? It's the
22 second line from the top.

23 A. I see measure as net income, yes.

24 Q. What does the period quarter 1 mean,
25 do you know?

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2 A. It might mean quarter 1, 2009.

3 Q. There's a list of brokers in the
4 middle of the page on the left side, UBS,
5 Oppenheimer, Buckingham Research, J.P. Morgan, do
6 you see that?

7 A. Yes.

8 Q. Are those the analysts whose reports
9 about Merrill were being summarized in this
10 document?

11 A. I think so.

12 Q. Am I reading this correctly to
13 suggest that the analyst -- the average analyst
14 estimate for Merrill Lynch's net income in the
15 first quarter of 2009 was a positive gain of
16 \$55 million?

17 A. Where are you seeing that? Where it
18 says average?

19 Q. Right, where it says average, just
20 below the current column.

21 A. Yes.

22 Q. And the median 391 million, do you
23 see that?

24 A. Uh-huh.

25 Q. Am I reading this correctly?

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2 A. I think that's what it says, but you
3 also see that there's a very wide range of
4 projections there from, you know, some
5 significant positive numbers, some significant
6 negative numbers.

7 Q. Do you recall if the fact that some
8 analysts who estimated Merrill Lynch is going to
9 make a profit in the fourth quarter of 2008 were
10 discussed in any of the meetings you had after
11 November 12th concerning Merrill Lynch's
12 financial performance for the quarter?

13 A. The only discussion I recall about
14 this is a discussion that the analyst reports
15 didn't seem to link to any particular conclusion.

16 Q. Who did you have that discussion
17 with?

18 A. It was one of these discussions that
19 in this week between the 12th and the 20th but I
20 don't remember specifically.

21 Q. In addition to the document that is
22 attached to Mr. Belk's e-mail, did you review any
23 additional information relating to analyst
24 testaments from Merrill Lynch?

25 A. No, I think at the time I realized

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2 that analysts might be all over the map to where
3 in the world we might be going, and when I looked
4 at what the historical disclosures had been and
5 when I looked at what the disclosures had been
6 that had went to shareholders, it seemed to me
7 that in many ways analysts were being more
8 optimistic than anybody had any reasonable right
9 to be, given what past experience had been given
10 and what the disclosures were. I guess in
11 hindsight it turns out they were wrong.

12 Q. It's not the first time. Let me show
13 you, Mr. Mayopoulos, what I'm going to mark as
14 Plaintiff's Exhibit 163.

15 (Plaintiff's Exhibit 163, Set of
16 handwritten notes, was so marked for
17 identification.)

18 Q. Which is a set of handwritten notes.
19 I am going to represent to you, Mr. Mayopoulos,
20 that the note on the top of the first, third and
21 I think it's the fifth page where it says
22 "Mayopoulos" is mine and not come to us with the
23 document.

24 A. I don't see those on my copy.

25 MR. BRESNAN: It's on some but not

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2 others.

3 MR. LIMAN: I think you've
4 distributed both types.

5 A. The one that's marked as an exhibit
6 doesn't have that on it.

7 Q. That's the important version and
8 that's clean. The three sets of notes in this
9 package or four sets of notes for meetings on
10 November 18th, let me just identify this document
11 for the record and then I'll ask you questions
12 about some of these notes. It's multipage, the
13 Bates on it is BAC-ML-NYAG 5021097 through 1103.

14 Mr. Mayopoulos, the notes on the
15 front page of this document, are those yours?

16 A. I think all of these notes in this
17 exhibit are in my handwriting.

18 Q. The first page has an entry on I
19 think it's like it's the second paragraph from
20 the top that reads I think "Comp," am I
21 misreading that, it's in the middle of the page
22 just a little above the middle.

23 A. Yes, I think it says c-o-m-p, yes.

24 Q. And can you read to me what comes
25 after that?

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2 A. "Call RB regarding data for others.
3 Guidance to others."

4 Q. What is the reference to RB about?

5 A. I'm trying to remember. I don't
6 remember. I have a vague recollection that there
7 was a consultant that did some work for Bank of
8 America's investment bank on compensation issues,
9 that Bill Caccamise, who is a senior lawyer for
10 that group, had told me about, and had encouraged
11 me to call that person to see if I couldn't get
12 some marketing intelligence as to what
13 compensation levels were likely to be for legal
14 department personnel in 2008.

15 This might refer to that but I can't
16 remember what RB is. I don't think this has
17 anything to do with Merrill Lynch. I think this
18 has to do with Bank of America compensation for
19 the legal department.

20 Q. You answered my next question. If
21 you'll go to paragraphs below that or two items
22 below that, there's an item entitled
23 "Disclosure," do you see that?

24 A. Yes.

25 Q. The first line below that reads is

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2 that "DTA issue"?

3 A. Yes.

4 Q. Do you know what that refers to?

5 A. I think it refers to deferred tax
6 asset issue, which was some issue that related to
7 Merrill Lynch that was part of the discussion
8 that Mr. Price had had with me and others as you
9 walked through this projected fourth quarter
10 loss, and somehow this deferred tax asset had an
11 impact on that analysis. I don't remember today
12 what the impact was or how it impacted it. But I
13 think that's what that refers to.

14 Q. Can you read to me what the line
15 below that reads. Is it "Earnings" and
16 "Capital"?

17 A. "Earnings, Capital," underneath that
18 it says "Consensus, Historical, '34 Act Filings,
19 Litigation Exposure."

20 Q. What is the reference to litigation
21 exposure about?

22 A. I think that was -- this is a to-do
23 list that I wrote to myself and I think these
24 all, including the litigation exposure reference,
25 are things for me to consider and think about as

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2 I considered the disclosure issue. Litigation
3 exposure in particular would be what was the
4 litigation risk of making a disclosure, and if
5 you got it wrong and what was the risk of not
6 making a disclosure.

7 Q. What do you mean litigation exposure
8 if you get it wrong?

9 A. In the context of this particular
10 matter if we had, for example, disclosed that we
11 were projecting a fourth quarter loss for Merrill
12 Lynch at \$5 billion after taxes and it turns out
13 that, just to pick a number, if the number was
14 \$15.1 billion, you would likely get sued because
15 shareholders would say you misled them as to what
16 the extent of the losses was likely to be.

17 Q. Would there be any litigation
18 exposure with a disclosure of a trend analysis?

19 A. Could there be, plaintiff's lawyers
20 are creative people, they can bring lawsuits
21 based on lots of things. I do think that if you
22 put out a trend disclosure and you said we think
23 the trend is that we're going to have a loss of
24 \$5 billion and it turns out you had a loss of
25 \$15 billion, somebody would say you misled us in

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2 describing what the trend was.

3 Q. Did you consider putting out a
4 disclosure that would say the losses are going to
5 be no less than what you had been advised by Mr.
6 Price or other people at Bank of America's
7 finance department?

8 A. I don't recall specifically
9 considering that but I don't frankly know how we
10 would have made that disclosure considering that
11 we still would have had a substantial portion of
12 the quarter left to go, and I don't think you
13 could say that you knew for certain that the
14 losses would not be less than a particular amount
15 of money.

16 Q. But is it fair to say that as of
17 November 12th you were informed -- advised that
18 Merrill Lynch had sustained a -- actual losses in
19 the month of October of certain -- of
20 multibillion dollars?

21 A. Yes.

22 Q. Did you consider putting out a
23 disclosure about that?

24 A. I don't recall specifically
25 considering that, I think the focus was around

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the projection for the entire quarter, but I guess from my perspective from a trend analysis the last five quarters showed what the trend was. I mean it wasn't like you needed a new report about what October was. You had five quarters of multibillion dollar losses. What was reporting on October going to tell you that the last five quarters didn't tell you that ranged anywhere from 2 to \$10 billion.

Q. Mr. Mayopoulos, if you can turn to the page that ends with Bates number 1101.

A. By the way, on this issue I think as a practical matter, and we always try to be very practical as we thought about these issues, if you put out a disclosure that says we think that we will have a loss of no less than, pick a number, \$5 billion, the fact that you framed the disclosure in the context of \$5 billion, investors will say that you were signaling to us that the loss would be in that ballpark. That it wouldn't be in some very different zip code like \$15 billion. So in the practical world of disclosure, I think that's an important consideration.

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I think the other practical consideration you have to think about is if you put out a disclosure that says the losses will be no less than \$15 billion, the first thing you're going to get asked by analysts is, well, you think it's going to be at least \$5 billion, if I said 15 I meant 5. If you think the loss is going to be at least \$5 billion, how much bigger than that do you think it can get. I mean it doesn't just stop with putting out a statement and saying we're not going to answer any questions about this. It provokes or instigates inquiries from the marketplace, and you have to be prepared for that and decide what you're going to do.

And I think for that reason many companies make a judgment that unless they have something specific and reliable that they can make a disclosure to the marketplace, they don't think that what they're disclosing is going to change the mix of information, they choose to be silent rather than to put out something that they then assume a duty to correct and update as circumstances change. That's why companies

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2 report on a quarterly basis.

3 Q. Were any of those considerations part
4 of your analysis back in November 2008?

5 A. Yes.

6 Q. Did you discuss any of them with
7 anyone at the bank or at Wachtell?

8 A. I think we discussed some issues with
9 Wachtell and I think we specifically discussed in
10 one of our conversations just what do we think
11 this disclosure would look like, and I think we
12 all wrestled with what does the disclosure look
13 like, just what would we say, and I don't think
14 we came to any resolution that was particularly
15 satisfying.

16 Q. If you turn to the last page of the
17 document, Mr. Mayopoulos, actually the
18 second to the last, there are notes of a meeting
19 that appears to have included Greg Curl, Ed
20 Herlihy and Nick Demmo. Do you see that?

21 A. Yes, I do.

22 Q. Do you recall this meeting?

23 A. Not specifically. I think this is
24 the meeting I was thinking about that I mentioned
25 earlier where I said I think I had some

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discussions with Mr. Curl and Mr. Herlihy. You asked whether any businesspeople had been involved and I have a vague recollection of this meeting in terms of Mr. Curl kind of running through some of these numbers, which I'm not sure I actually had in front of me because I think this is my effort to take down some numbers, but judging by my notes, I don't think I was being very effective at that. But I don't -- other than my notes here, I don't have a specific recollection of the conversation.

Q. We discussed earlier the analyst estimates that you had asked to review as part of your analysis, do you recall that?

A. Yes.

Q. There's a reference at the top of the page to consensus, is that through the analyst estimates?

A. I think so, but I'm not sure where these numbers came from. I think this is Mr. Curl kind of rattling off some numbers but I can't tell you that I remember that specifically.

Q. Do you recall any conversations with Mr. Curl or anybody else at that meeting

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2 concerning the fact that Merrill Lynch's analyst
3 consensus was positive?

4 A. I don't remember that.

5 MR. BORYSHANSKY: Why don't we take a
6 quick break so the videographer can change
7 the tapes.

8 THE VIDEOGRAPHER: The time is 3:27.
9 This ends tape number four of the
10 videotaped deposition of Tim Mayopoulos.

11 (Recess taken)

12 THE VIDEOGRAPHER: The time is 3:47.
13 This begins tape number five of the
14 videotaped deposition of Mr. Tim
15 Mayopoulos.

16 BY MR. BORYSHANSKY:

17 Q. Mr. Mayopoulos, before we took a
18 break you had testified about a number of
19 meetings that you had with Wachtell attorneys to
20 discuss Merrill Lynch's projected losses in the
21 fourth quarter of 2008 and whether or not a
22 disclosure had to be made concerning those
23 losses, do you remember that?

24 A. Yes.

25 Q. What was the conclusion that was

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2 arrived at as a result of these meetings?

3 A. Well, we ultimately had a discussion
4 on November the 20th with Mr. Price, myself, Ms.
5 Brenner, Wachtell Lipton lawyers, perhaps some
6 others, and we concluded in that discussion that
7 no further disclosure was warranted.

8 Q. What were the reasons that you had
9 reached that conclusion?

10 A. There were several reasons, one was
11 that, as I mentioned earlier, we didn't believe
12 there were any prior statements about Merrill
13 Lynch's projected or future performance that
14 required a further disclosure to update them or
15 to correct them.

16 Second, the past five quarters of
17 earnings at Merrill Lynch should have revealed to
18 investors that Merrill Lynch had a long history
19 of multibillion dollar losses anywhere from 2 to
20 \$10 billion in a quarter, and that that was -- it
21 was not unreasonable to think that that was going
22 to continue in the future.

23 Third, the disclosures that were put
24 out to investors in the form of the 10-Ks and
25 10-Qs, that they were incorporated by reference

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into the proxy statement, it was made clear that these were extremely difficult and challenging times indicated that Merrill Lynch's financial performance was not likely to get better and might in fact get worse.

And then fourth, there were a number of other public events, very public events that were occurring in the marketplace such as the failure at Bear Stearns and Lehman Brothers and AIG and the takeover of Fannie Mae and Freddie Mac and all these events that were occurring that were clear signals to investors that the marketplace was very difficult and very challenging and that financial institutions such as Merrill Lynch were likely to continue to face very difficult circumstances.

I think finally there was an aspect of this that it was not a high degree of confidence in the reliability of the projections that had been created, and from my own perspective I thought it was important that whatever information we put out to the marketplace needed to be reliable such that investors could make investment decisions based

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2 on it.

3 So those were -- in my mind those
4 were the principal reasons for the conclusion.

5 Q. Why was there no high degree of
6 confidence in the Merrill projections?

7 A. There was an element of it that was
8 clearly in terms of the forecast essentially a
9 guess as to what was going to happen for the
10 balance of the quarter. And it didn't seem to me
11 that something that was basically a rough guess
12 as to what was going to happen, it didn't seem to
13 me that was a reasonable basis to put out a
14 disclosure to investors. That we should have --
15 we should be basing our disclosure on something
16 that was actually reliable and something that
17 management had confidence in.

18 Q. Was it your understanding that a
19 component in the projection that you had been
20 given was a rough guess based on what you had
21 been told by Mr. Price?

22 A. Yes, I mean Mr. Price had told me
23 that there was a contingency base built into the
24 number, and when you look into the spreadsheet
25 it's got some notations to that effect.

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1 Mayopoulos

2 Q. When you say contingency, what do you
3 mean?

4 A. That there was a billion dollar plug
5 factor or guess as to what additional losses
6 might -- what Merrill Lynch might suffer for the
7 balance of the quarter.

8 Q. Of the people who looked into the
9 disclosure issue, did anybody dissent from the
10 conclusion that no disclosure was necessary?

11 A. No.

12 Q. Everybody agreed?

13 A. To my knowledge everybody agreed.

14 Q. You just walked me through the
15 reasoning for why disclosure was not necessary,
16 was that ever spelled out in a conversation or a
17 meeting?

18 A. I don't think that it got expressed
19 in the narrative form that I just gave, but I
20 think all those facts were discussed in this
21 discussion that we had on November the 20th.

22 Q. What was the decision -- strike that.
23 In addition to concluding that no disclosure was
24 necessary, was there anything else that was
25 agreed to in that meeting?

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2 A. I don't know. I mean I know that I
3 myself had a couple of things I wanted to follow
4 up on, but including finishing reviewing the
5 Merrill Lynch disclosure documents which I don't
6 think I had done by the time the meeting had
7 happened on the 20th, but I don't remember any
8 particular agreement coming out of the meeting.

9 Q. What was the other item you wanted to
10 follow up on, do you remember?

11 A. I don't remember offhand.

12 Q. Did you finish the review of the
13 Merrill Lynch filings?

14 A. Yes.

15 Q. Did you change your conclusion?

16 A. No.

17 Q. Did either you or anybody else at the
18 meeting suggest that you continue to monitor
19 Merrill Lynch's financial situation and reconvene
20 any change that occurred?

21 A. I don't know if we specifically
22 discussed that, I thought that was -- I mean it
23 seemed to be implicit in the nature of the
24 conversation that we were having.

25 Q. Why do you say that?

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2 THE VIDEOGRAPHER: The time is 3:53
3 and we're going off the record.

4 (Discussion off the record)

5 THE VIDEOGRAPHER: The time is 3:54
6 and we are back on the record.

7 Q. Mr. Mayopoulos, I think my last
8 question to you was why did you believe it was
9 implicit in your conversation where the Wachtell
10 attorneys and the executives of the bank that you
11 would continue to monitor Merrill Lynch's
12 situation?

13 A. I don't know, I don't recall a
14 specific discussion about it.

15 Q. In a minute I'm going to ask you
16 about a conversation that you had with Mr. Price
17 and Mr. Curl on December 1 concerning the MAC
18 clause.

19 A. Yes.

20 Q. In the almost two weeks after the
21 meeting -- strike that. In the days after you
22 had concluded that no disclosure was necessary of
23 the projected performance of Merrill Lynch, did
24 you ask Mr. Price or Mr. Curl or anybody else for
25 updates on Merrill Lynch's situation?

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A. No, except for a conversation that I had with Mr. Price on December the 3rd, I didn't get any further updates.

Q. Did anybody else who worked for you ask for that information to your knowledge?

A. Not that I'm aware of. While you're doing that, let me make a clarification before I forget to do it because I had forgotten once before to do it. That is early on we were talking about testimony I had given to others and I think I testified that I gave testimony to the New York Attorney General's Office in August.

Q. You said twice.

A. I did twice. And I think I said the second time was before that, before August. I was wrong about that, I think the first time was in August and the second time was in October.

Q. After the privilege had been waived?

A. Right. So I just wanted to clarify that.

Q. Let me put in front of you what I just marked as Plaintiff's Exhibit 164.

(Plaintiff's Exhibit 164, Document bearing Bates number BAC-ML-NYAG 5021107,

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2 A. No.

3 Q. What was your reaction to Mr. Price
4 after he had told you that the projected losses
5 had increased to \$7 billion?

6 A. I thought that what I told him was
7 that based on the factors we had discussed with
8 Wachtell on the November 20 call and that I
9 didn't believe that it changed the conclusion
10 that no further disclosure warranted.

11 Q. Did you say anything else?

12 A. There might have been some discussion
13 about my reaching out to Wachtell to talk with
14 them. I have a vague recollection that we talked
15 about that.

16 Q. To get an additional confirmation as
17 to whether or not the change would justify making
18 a disclosure?

19 A. Yes.

20 Q. Did you reach out to Wachtell?

21 A. I had a vague recollection that I had
22 but I don't have any record that I did.

23 Q. We've talked previously, you've
24 testified previously about the analysis and the
25 work that you have done in the middle of November

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1 Mayopoulos

2 to satisfy yourself whether or not a disclosure
3 had to be made of Merrill's projected losses for
4 the quarter, do you remember that?

5 A. Yes.

6 Q. Did you do any work or research after
7 your meeting with Mr. Price?

8 A. On December 3?

9 Q. Yes.

10 A. No.

11 Q. Why not?

12 A. I didn't think that any further work
13 or research was warranted based on what I had
14 been told. The fundamental facts on which our
15 analysis was based had not changed and the
16 rationale hadn't changed. The 7 billion dollar
17 number was still well within the historical
18 experience of Merrill over the prior five
19 quarters and the prior disclosures were still the
20 same prior disclosures that we had talked about
21 on November the 20th, and I didn't think any
22 further analysis was warranted.

23 Q. Did you attend the shareholder
24 meeting on December 5th?

25 A. Yes, I did.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. 09-CV-6829

BANK OF AMERICA,

Defendant.

-----x

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JOE LEE PRICE

New York, New York

Friday, December 18, 2009

Reported by: Steven Neil Cohen, RPR

Job No. 306225

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2 Q. Did you -- did Mr. Cotty tell you
3 that this forecast reflected the best
4 information that he had at the time?

5 A. As adjusted, you know, as we just
6 talked about for these items was my
7 impression, yes.

8 Q. Did Mr. Cotty tell you that this
9 forecast was incomplete in any way?

10 A. Mr. Cotty, my recollection is, he
11 represented this was the best forecast we
12 had, again as adjusted for these items.

13 Q. Did he tell you that he felt that
14 this was -- this forecast was incomplete?

15 A. I don't recollect that, no.

16 Q. Was it your understanding that
17 this forecast was complete?

18 A. Yes. That this was our best
19 estimate at that time or their best estimate
20 at that time.

21 Q. You testified earlier, Mr. Price,
22 about -- that after you received this
23 forecast it prompted you to consider
24 disclosures, is that fair to say?

25 A. Yes. I believe this was the base

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2 forecast that did that, yes.

3 Q. What specifically are you
4 referring to?

5 MR. JEFFRESS: Specifically
6 referring to about what?

7 BY MR. BORYSHANSKY:

8 Q. Did you raise the question of
9 whether -- strike that.

10 Did you have a concern as to
11 whether the Merrill's forecast for the
12 quarter should be disclosed?

13 A. The forecast made me raise the
14 question of should there be anything
15 disclosed.

16 Q. Did you raise that question with
17 anyone in particular?

18 A. Yes. Tim Mayopoulos, our general
19 counsel, among others.

20 Q. When did you first raise it with
21 Mr. Mayopoulos?

22 A. I don't recollect the exact date
23 but it was on or around -- soon after I got
24 the forecast.

25 Q. Did you also raise it with

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2 When you raised the issue of
3 disclosure with Mr. Thain and Mr. Chai was
4 there any discussion about what form of
5 disclosure?

6 A. I am not saying there wasn't. I
7 don't recollect that.

8 I recollect them having a view
9 that there shouldn't be disclosure was the
10 principal point that I recollect.

11 Q. Did you consider whether -- what
12 the form of disclosure would be?

13 A. No. My question at that point
14 was, do we need to disclose.

15 Q. Disclosure where, in the proxy
16 statement?

17 A. Or in some form that would
18 therefore end up in a proxy statement,
19 incorporation or something.

20 Q. Did you consider whether a form
21 8-K was required?

22 A. I was not thinking about the
23 particular -- as I recollect, I wasn't into
24 the particular. I was asking kind of a
25 basic question at that point.

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2 Q. What did you tell Mr. Mayopoulos?

3 A. Well, as I recollect I asked him
4 the same question and then I did tell him I
5 was going to ask the same question to John
6 and Nelson, and provided him -- and that
7 started a process, I guess is a better way
8 of saying it, of providing him information.

9

10 Q. Did you provide a copy of the
11 forecast to Mr. Mayopoulos?

12 A. I believe I did.

13 Q. Is it a copy of this forecast?

14 A. Yes. I think so. I am not
15 remembering the exact thing but I think so,
16 yes.

17 Q. Did you explain to Mr. Mayopoulos
18 anything about the forecast?

19 A. I mean, there was a general
20 discussion about the forecast as I
21 recollect, including, you know, the
22 adjustments to it, if you want call it that
23 as I recollect.

24 Q. What was that general discussion?

25 A. This was the best view, the best

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2 view of the fourth quarter estimate or the
3 fourth quarter forecast.

4 Q. Did you explain to Mr. Mayopoulos
5 that there was an expected gain from a tax
6 asset?

7 A. As I recollect I went through all
8 of the -- all of this with Tim.

9 Q. Was there any discussion with Tim
10 Mayopoulos about whether the forecast for
11 Merrill's quarterly performance was
12 incomplete?

13 A. No. Again I think that -- well, I
14 think the same points I was making to you
15 earlier. I may have reiterated in that that
16 this was the best view that the team had
17 given me.

18 Q. What was Mr. Mayopoulos' initial
19 reaction when you first told him about the
20 forecast?

21 A. You know, this is dating. My
22 recollection is he said, why. I mean, why
23 would you think that or why -- that was
24 my -- that is my recollection of it.

25 Q. Did you explain why?

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2 A. I simply said, I am calling the
3 question, they have an X dollar, you know,
4 number and I am asking the question.

5 Q. What prompted you to ask the
6 question?

7 A. These numbers, the results.

8 Q. The magnitude of the number?

9 A. Yes. I guess -- I don't know that
10 I thought about it that hard. I mean, it
11 was the numbers, yes, that prompted me to
12 ask it.

13 Q. Because it was a large loss?

14 A. Yes.

15 Q. What did Mr. Mayopoulos tell you
16 he will do? Strike that.

17 What was Mr. Mayopoulos' advice to
18 you?

19 MR. JEFFRESS: At that time or --

20 BY MR. BORYSHANSKY:

21 Q. At that time?

22 A. Right when I first communicated
23 that to him?

24 Q. Yes.

25 A. I don't recollect there being

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2 advice as much as we need to go through the
3 mechanics -- we need to go through the
4 details and get a better understanding.

5 Q. What details did Mr. Mayopoulos
6 tell you he -- you needed to go through?

7 A. At that time again?

8 Q. Yes.

9 A. I don't recollect us going into a
10 lot of details at that time.

11 We subsequently had other
12 conversations where we went through it but
13 at that particular time I think that was
14 pretty much the discussion.

15 Q. In the course of the following
16 week you reviewed additional information and
17 had additional meetings; is that right?

18 A. Correct.

19 Q. You have a notation on the
20 forecast on the front page it reads,
21 "Concluded with Tim and Ed that no
22 premeeting," is that "disclosure?"

23 A. "Disclosure necessary."

24 Q. "Disclosure necessary."

25 Is that your handwriting?

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2 A. Yes, sir.

3 Q. When was that notation added to
4 the forecast, do you remember?

5 A. I think it was on or around the
6 time we concluded -- reached that
7 conclusion.

8 Q. Who was involved in reaching that
9 conclusion?

10 A. Tim Mayopoulos, our general
11 counsel, and there were a number of people
12 that did work to support the analysis,
13 attorneys from Wachtell, Lipton, myself,
14 were the principal, our chief accounting
15 officer, I think Craig Rosato was in the
16 kind of conclusion meeting.

17 Those are the main principals I
18 remember.

19 Q. Was -- would it be fair to say
20 that the starting point of those discussions
21 was that some form of disclosure had to be
22 made?

23 A. No. I was asking the question,
24 not that I knew the answer. I was asking
25 the question.

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2 Q. Did any one of the participants in
3 those discussions suggest at any point that
4 some disclosure had to be made?

5 A. No. I don't recollect that.

6 It was more of a kind of a
7 fact-based process that we went through to
8 make a determination.

9 Q. Did you review any information in
10 the course of those discussions or outside
11 of those discussions concerning the
12 disclosure question?

13 MR. LIMAN: Go ahead if you can
14 answer.

15 THE WITNESS: As I recollect, my
16 reviews were part of those discussions.
17 That was in essence the review, part of
18 those discussions and review of material
19 that Tim had prepared for that.

20 BY MR. BORYSHANSKY:

21 Q. What materials were those?

22 A. Well, that -- you want me to --

23 MR. JEFFRESS: Just go through.

24 THE WITNESS: -- go through the
25 process that we -- yes. So the first --

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2 the things I recollect the most
3 pertinent to me were, you know, what was
4 driving the losses and was there
5 anything in the losses that suggested
6 that the franchise -- you know, there
7 was something about the franchise we
8 didn't recognize and as I recollect, the
9 determination was, you know, the losses
10 were coming from known asset classes
11 generally that we had identified before
12 and the market was horrendous, as we all
13 knew, and it was having a more
14 significant impact on those asset
15 classes as opposed to there was some
16 dramatic change in the franchise
17 operation from that.

18 We also looked, as I recollect, at
19 historical losses of Merrill Lynch
20 including, you know, the third quarter
21 and other periods prior to that where
22 they had like the large gain on
23 Bloomberg, I believe, that, you know, so
24 some of the big items that were in them.

25 We also looked at, was there

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2 anything to update in the system per se
3 or in the public record or whatever and
4 concluded there wasn't.

5 We also looked at the existing
6 disclosures, the proxy, but probably as
7 importantly, the incorporated documents
8 that included the 10-Qs that had just
9 been filed that had all the recent
10 market event kind of language in them
11 and all the disruption and the fact that
12 it was impacting businesses.

13 And then, obviously, you know,
14 asked the advice of counsel, you know,
15 from that standpoint.

16 Those are the things that stick in
17 my mind as the main points that we
18 looked at and reviewed and talked about.

19 BY MR. BORYSHANSKY:

20 Q. Which asset classes were known
21 and -- that you concluded were the drivers
22 of the losses?

23 A. Again, it was more of a, is there
24 a component of the losses that we have
25 identified that is coming from an asset

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2 class that we hadn't, you know, evaluated in
3 due diligence.

4 And the only thing that I can
5 recollect was that we came across and it was
6 not any significant losses, it was actually
7 quite small and, you know, on this stuff was
8 an asset-based lending portfolio that we had
9 not looked at in due diligence but again it
10 was not, it was not and has not been a
11 driver of, you know, of any of the, you
12 know, market disruption losses.

13 Q. The majority of the other losses
14 were driven by asset classes that you had
15 become familiar with during due diligence?

16 A. That the due diligence team had
17 evaluated, yes.

18 Q. Did that include -- did that --
19 did those asset classes include the
20 correlation book at Merrill?

21 A. I believe so, yes.

22 Q. Any other asset classes?

23 A. Leveraged loans at the time.
24 Probably insurance wraps which would have
25 credit spread component.

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2 So it was all of those core basic
3 asset classes as I recollect.

4 Q. Did you yourself review Merrill's
5 historical performance as part of the
6 analysis as to whether disclosure had to be
7 made?

8 A. I recollect having a schedule that
9 someone had summarized it, you know, and so
10 the answer is, I saw the schedule but I
11 didn't go back and get the actual results.

12 Q. In addition to what you have
13 mentioned, the historical performance, the
14 existing disclosures and the other items you
15 testified to, did you also review analyst
16 estimates about Merrill?

17 A. I don't recollect looking at those
18 because you know, back when -- even when I
19 first brought this up to John and Nelson
20 they were like, no one is following us
21 anymore, they are irrelevant, so no one is
22 updating their estimates.

23 And I don't recollect that being a
24 pertinent item I was thinking about at that
25 time because nobody was updating.